Supreme Court, U.S.
FILED
OCT 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MELBA J. TAYLOR, *et al.*,
Petitioners,

v.

HUDSON PULP AND PAPER CORP., *et al.*,
Respondents.

On a Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT HUDSON PULP & PAPER CORP.'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Supreme Court grant review of a decision in which the court of appeals applied the appropriate standard of review to the district court's decision dismissing plaintiff's Title VII cause of action for failure to establish a *prima facie* case and where petitioners never asserted before the court of appeals that there might be a conflict with regard to the proper standard of review to be applied?

2. Should the Supreme Court grant review of a court of appeals decision where the appellate court engaged in a full review of the record and upheld the district court's findings and where the petitioners never requested the district court to supplement its findings or argued to the appellate court that the findings below were inadequate?*

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* Corporate affiliations are noted at p. ii of Petitioners' Brief.

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STATEMENT OF THE CASE

A. Statement of the Facts

This petition involves a Title VII sex discrimination case brought by six employees of Respondent Hudson Pulp & Paper Corp. ("Hudson" or "company") alleging discrimination during the actionable period of April 3, 1976 to September 30, 1976. 42 U.S.C. § 2000e-5(c) (1982). (App. 41a.)[1] It has its genesis in the 1970 clos-

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[1] "App." refers to the Appendix attached to the petition for certiorari. "Tr." refers to the trial transcript.

ing of Hudson's Multiwall Department, in which each plaintiff was then working. (App. 40a.) Petitioners complained in their EEOC charges that after the Multiwall closing and their subsequent transfer to the Bag Department, they were frequently laid off instead of other women who had greater Bag Department seniority but less mill seniority. Petitioners also alleged in their EEOC charges that they were allowed to transfer in 1970 only to a traditionally female job in the Bag or Tissue Department.[2]

Whatever occurred in earlier years, by 1974 the company was fully engaged in affirmative efforts to assist female employees in obtaining jobs throughout the mill, including those jobs which had traditionally been filled by males.[3] In January 1974 the Company newspaper for employees contained a feature article entitled "Hey Lady, Wanna Be a Welder?" which in very strong terms encouraged women to seek transfer to traditionally male jobs. (App. 8a.)[4]

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[2] Five Petitioners also complained in their EEOC charges that there were unspecified jobs in the pulp mill that they could perform but that they could not take such jobs without losing their departmental seniority and risking unacceptable layoffs. Five plaintiffs also asserted that they were discouraged from moving up the line of progression to machine operator and above in the Bag Department because they first had to work as a chute loader which required lifting of bales that were too heavy for them. None of the EEOC charges alleged that the company failed to automatically promote them within the Bag Department.

[3] The District Court found that any discriminatory practices which might have allegedly occurred prior to 1974 were cured by subsequent acts of the company and that any practices which might have existed in 1976 were present effects of past discrimination, which are not actionable. (App. 41a.) This ruling is not challenged by Petitioners.

[4] The article stated in pertinent part:

> [W]hat about discrimination because of sex? If a woman wants to be a welder, or wants to work on the Kraft Paper

Shortly after the "Hey Lady" article appeared in 1974, women who were known to plaintiffs, including Petitioner Knowles' stepdaughter, began requesting transfers to and receiving jobs traditionally held by men. Thus, by April 1976 there were women in traditionally male jobs in the Laboratory, Storeroom and Wood Receiving Departments.[5]

The Company also took steps to encourage women to move to traditionally male jobs within the Bag Department. Prior to the 1974 labor agreement there were two lines of progression within the Bag Department, the "bag catcher" line and the "baler" line. While nothing in the

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> Machines or wants to try the tow-motor and load boxcars in one of the Shipping Departments, can she do it? Absolutely! All she has to do is put in a transfer . . . After all, women proved they could weld during World War II right here close at home at the shipyards in Jacksonville. Similarly, if a woman is capable and willing to start out on the broke meters she then has the opportunity to work towards becoming a machine tender. If she is willing to work in the lime kilns she can then be on the road to becoming a digester cook. This is the same route that the men take.
>
> So what about it ladies? You know a gal doesn't have to be a bra-burning women's libber in order to want to do something besides catch bags or napkins all day or pound a typewriter for eight hours. She just might be able to load that box car as good as any man; after all, the tow-motor does most of the work. And if this is what she wants and if she can do the job, why shouldn't she be given the opportunity?

[5] In May 1974, Phyllis Smith, who had been in Multiwall with Petitioners, transferred to the Laboratory as a kraft pulp tester. In October 1974, Arta Mae Choate transferred from the Bag Department, where plaintiffs were then working, to the Storeroom as a store issues clerk. On August 25, 1975, Virginia Sheppard also transferred to store issues clerk. On April 19, 1976, Mary May transferred to the Laboratory as a kraft pulp tester. On April 12, 1976 Diane Suckow, plaintiff Knowles' stepdaughter, transferred to the Wood Receiving Department as a woodchecker. (App. 9a n.3.)

contract prevented women from moving from the bag catcher line to the baler line, some women, including petitioners in their EEOC charges (*see* n.2, *supra*), complained that the baler line entry level position of chute loader was too difficult for some females. Effective June 1, 1974, the two lines of progression were merged above the chute loader job so that bag catchers could switch over to the baler line of progression and bypass the "demanding" chute loader job. (App. 4a.)

In 1975 and early 1976 Hudson and the unions negotiated two major bargaining agreements.[6] The Amended Seniority Agreement ("ASA"), which applied generally to all employees, abolished departmental seniority, rearranged lines of progression, and established a transfer system whereby vacancies were posted and bid for at the time they occurred. (App. 4a.) It was the use of departmental seniority as opposed to mill seniority which Petitioners claimed in their EEOC charges was holding them back.[7]

The Special Seniority Procedures ("SSP") gave to female and black employees (known as "designates") who were hired prior to the effective date of Title VII, such as Petitioners, the right to: (1) "pre-bid" before other

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[6] The Amended Seniority Agreement was tentatively agreed to on January 23, 1976. (App. 4a.) The Special Seniority Procedures was tentatively agreed to on March 25, 1976, revisions were made on April 22, 1976, and both agreements were signed on July 20, 1976. (*Id.*)

[7] Petitioners admitted that the use of departmental seniority effected men and women equally. In any event, the inability to use the type of seniority which is most beneficial to you personally is not discrimination. *See International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 370 n.56 (1977) ("Those nonapplicants who did not apply for transfer because they were unwilling to give up their previously acquired seniority suffered only from a lawful deterrent imposed on all employees regardless of race of ethnicity.").

employees for entry-level jobs in any department in the plant; (2) use their mill seniority in all employment matters, including promotion, layoff and recall for layoff; and (3) use special "red-circle" wage protection which guaranteed they would receive their old rates of pay if they transferred to a job which paid less. (App. 4a-5a.)

Petitioners concede that none of them submitted a single transfer request between 1970, when they all transferred to the Bag Department, until September 1976, when they submitted transfer requests under the preferential terms of the ASA and SSP outlined above. With the exception of Petitioners Burroughs and Carter, who withdrew their requests and retired, each Petitioner prebid for and was awarded the *first* job which became available to which her mill seniority entitled her. (Tr. I 56, II 221, 241-43, 246-47, III 27-28, 121-22.) Petitioners bid for and received the jobs of lime kiln helper, tall oil operator, kraft pulp tester, store issues clerk and wood checker—the very jobs to which women had transferred prior to and during the actionable period under the old transfer request system. (*See* n.5, *supra.*)

B. Procedural History

The trial was held over four days in July 1984 before the Honorable John H. Moore II in Jacksonville, Florida. After plaintiffs rested their case, defendants moved for involuntary dismissal pursuant to Fed. R. Civ. P. 41(b). After retiring to chambers for approximately four hours to consider the evidence, Judge Moore granted defendants' Rule 41(b) motion, announcing his findings from the bench. (*See* App. 39a-43a.)

The District Court found that plaintiffs had failed to make out a *prima facie* case of discrimination as required under this Court's decisions in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). (App. 39a-43a.) Plaintiffs never moved the District Court to make more detailed findings of fact or conclusions of law. The District Court also dismissed the action, alternatively, based on plaintiffs' failure to satisfy EEOC administrative requirements. The Court found that plaintiffs had failed to both sign their EEOC charges under oath and to file those charges with the appropriate state agency prior to filing with the EEOC. (App. 43a.)

Plaintiffs appealed, asserting that the District Court erred in finding that plaintiffs had failed to make out a *prima facie* case. Plaintiffs also asserted that the District Court erred in ruling that plaintiffs failed to comply with EEOC administrative requirements. In its briefs to the Court of Appeals, plaintiffs mentioned nothing about any conflict with regard to the proper standard of review to be applied to a Rule 41(b) dismissal of a Title VII discrimination case.

On May 19, 1986 the Court of Appeals for the Eleventh Circuit affirmed the District Court's decision holding that plaintiffs had failed to establish a *prima facie* case. (App. 1a-34a.) Because the Court of Appeals agreed that plaintiffs had failed to carry their evidentiary burden, they found it unnecessary to address plaintiffs' appeal of the District Court's alternative grounds for dismissal; failure to satisfy EEOC administrative requirements.

Plaintiffs submitted a Petition for Rehearing and Suggestion for Rehearing *En Banc*, raising for the first time the assertion that the standard of review of a Rule 41(b) dismissal of a Title VII action was unclear. Despite plaintiffs' contention that there was a conflict *within* the Eleventh Circuit with regard to the proper standard of review, no member of the original panel or any active Judge of the Eleventh Circuit voted for *en banc* consideration. (App. 37a-38a.)

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE VARIOUS COURTS OF APPEALS REGARDING THE STANDARD OF REVIEW OF A RULE 41(b) DISMISSAL OF A TITLE VII ACTION FOR FAILURE TO ESTABLISH A *PRIMA FACIE* CASE

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court set down a three part order of proof to be applied in Title VII discrimination cases. The plaintiff must first make out a *prima facie* case of discrimination. If such a case is established, the defendant has an opportunity to show that the employment action at issue was taken for valid, nondiscriminatory reasons. The plaintiff may then attempt to show that the employer's "valid" reasons are pretextual. This system was established, in part, in recognition of the fact that it would often be very difficult for plaintiffs to put forward direct evidence of discrimination. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983).

It is certainly not difficult to establish a *prima facie* case of discrimination:

> The burden of establishing a *prima facie* case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). *See also McDonnell Douglas*, 411 U.S. at 802.

In this case the District Court found that Petitioners failed to esablish a *prima facie* case since they failed to establish that they applied for any particular jobs within the actionable period or that there were any vacancies during that period:

> It's the Court's opinion that this is the precise type of case which cries out for the application of the *Burdine* case as well as the *McDonnell-Douglas* case, and that the failure of the plaintiffs to prove that they applied for a vacancy for which they were qualified and rejected and prove that there was in fact such a vacancy, operates to defeat their claims. Further, that there was no showing and no proof that the vacancy for which they would have applied, if there had been such a vacancy, was given to a person of the opposite gender. (App. 41a-42a.).

The Court of Appeals, analyzing the evidence presented, found that the District Court's findings that plaintiffs had failed to establish either a vacancy during the actionable period or that they had applied for a vacancy during that period, were not clearly erroneous. Since the plaintiffs had failed to establish the *McDonnell Douglas* criteria for a *prima facie* case, the Court of Appeals upheld the District Court's dismissal.

Petitioners now contend that the standard by which the Court of Appeals may review such a determination is unclear and should be addressed by this Court. Petitioners claim that while some courts apply a clearly erroneous standard to a finding of no *prima facie* case, other courts view such determination as wholly a matter of law, subject to plenary review.

A. Petitioners Have Waived Their Right to Seek Review of This Issue Before the Supreme Court

Except under exceptional circumstances, this Court will not address issues not raised before the Court of Appeals:

> Ordinarily, this Court does not decide questions not raised or resolved in the lower court. *California v. Taylor*, 353 U.S. 557 n.2 (1957); *Lawn v. United States*, 355 U.S. 339, 362-363 n.16 (1958) . . . . Its usual formulation is: "It is only in exceptional

> cases coming here from federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Youakim v. Miller, 425 U.S. 231, 234 (1976). *See also Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion in denying defendants costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us."); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") Raising an issue for the first time in a suggestion for *en banc* review does not cure this defect. *See Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984):

> We also do not address Ronwin's contention that the Arizona method of limiting bar admissions violates the Fifth and Fourteenth Amendments. As Ronwin concedes, he made this argument for the first time in his response to petitioners' motion for rehearing in the Court of Appeals. His failure to raise this issue in a timely manner precludes our consideration.

Petitioners made no mention in their briefs to the Court of Appeals that the standard of review might be in question—even though they claim that the standard is in dispute *within* the Eleventh Circuit. Petitioners set out the "standard of review" in their appellate brief as follows:

> A district court's findings of fact may be set aside when they are clearly erroneous. Fed. R. Civ. P. 52 (a). In addition, "if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 72 L.Ed. 2d 66, 79 (1982).

> Legal rulings are fully reviewable. *E.g., Horn v. C.L. Osborn Contracting Co.*, 591 F.2d 318, 320 (5th Cir. 1979). ("[T]his court is free to substitute its judgment on the law before it.")[8]

By not raising the alleged "conflict" before the Court of Appeals, petitioners attempted to have it both ways. That is, no matter which standard the court applied, petitioners could later argue that the standard is in dispute and the court should perhaps have applied the other standard. A party should simply not be permitted to state in its appellate brief in very straightforward terms what the standard is and then, upon receiving an adverse decision, contend that the standard is different or unclear. There is certainly nothing exceptional about this case which should cause this Court to abandon its general rule that matters not raised before the Court of Appeals will not be considered.

B. To the Extent Any Conflict Exists, it Is Intra, not Inter Circuit

As Petitioners themselves explain, any conflict—to the extent one exists—is between courts of the *same* circuits: "[I]n *Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 539-46 (9th Cir. 1982), one panel of the Ninth Circuit, per Judge Clifford Wallace, considered the issue at length, [and] criticized other Ninth Circuit decisions that applied the clearly erroneous standard. . . ."[9] (P. Br. p. 11.) In describing the alleged "conflict", Petitioners cite cases from the fifth, sixth, ninth, and eleventh circuits which have applied the clearly erroneous standard. (P. Br. p. 12.) They then cite cases from the very

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[8] (Petitioners' Appellate Br., p. 39.) Petitioners contended that the dismissal of their action as to the unions for failure to establish a *prima facie* case was "clearly erroneous". (*Id.* at p. 49.)

[9] *Gay* was an action under 42 U.S.C. § 1981 *et seq.* In discussing the standard of review, the court in *Gay* distinguished *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), on the basis that it was a Title VII action, not a § 1981 case. 694 F.2d at 545 n. 14.

same circuits purporting to hold that the question is subject to plenary review. (P. Br. p. 13.) Thus, even assuming that a conflict exists, it is certainly not ripe for Supreme Court review when the circuits themselves have not taken a final position on which standard to apply.

C. There Is No Conflict

There is no dispute that a court of appeals is to apply the "clearly erroneous" standard to a district court's ultimate determination of whether there exists an intent to discriminate. *See Pullman-Standard v. Swint*, 456 U.S. 273 (1982). *See also* P. Br. pp. 11-12. There is likewise no dispute that a court of appeals is to apply the "clearly erroneous" standard to the question of whether the plaintiff has established each element of the *McDonnell Douglas* test for a *prima facie* case: "Appellate review of any individual factual element of a *prima facie* case is made pursuant to the clearly erroneous standard." (P. Br. p. 10 n.6.) According to Petitioners, "[t]he disagreement in the courts of appeals relates to the overall conclusion as to whether the facts make out a *prima facie* case." (*Id.*)

Although petitioners claim that the same "conflict" which they now bring before this Court exists *within* the Eleventh Circuit, not one judge from that court voted for *en banc* review of this question. Moreover, Judge Clarke mentioned nothing about any conflict regarding the standard of review in his dissent. He instead focused on his disagreement with the panel's holding that the lower court's decision was not clearly erroneous.

In the context of establishing a *prima facie* case under Title VII, the Supreme Court has set out the law very clearly and succinctly; the plaintiff must establish that there was a vacancy for which she was qualified and that she actually applied for that vacancy and did not receive the job. If the Court of Appeals determines

that the District Court's findings as to whether the *McDonnell Douglas* criteria were satisfied are not clearly erroneous, it has no choice but to uphold the decision, unless the district court made a mistake in applying the criteria, *i.e.*, a mistake of law.

The cases cited by petitioners which supposedly hold that the ultimate finding of no *prima facie* case is subject to plenary review fall into essentially two categories. First, they are cases where because the court of appeals found the district court to have been clearly erroneous with regard to its findings of whether the plaintiffs established each of the *McDonnell Douglas* elements, they held as a "matter of law" that there was no *prima facie* case.[10] Of course, in this case the Court of Appeals found the District Court's findings on the *McDonnell Douglas* elements to have been correct.

Petitioners also cite several cases which, relying on a footnote in *McDonnell Douglas* that the criteria set out in that decision may vary from case to case, supposedly held that a *prima facie* case was established even though the criteria were not technically satisfied. Yet, there has never been a claim in this case that the *McDonnell Douglas* criteria should not be followed. Petitioners' briefs to the Court of Appeals claimed only that the District Court's findings as to those criteria were clearly erroneous, not that the criteria should not be applied.

There can be no doubt that the application of mixed questions of fact and law can be confusing. "The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law." *Pullman-*

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[10] *See, e.g., Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370 (6th Cir. 1984), *cert. denied*, 106 S. Ct. 3298 (1986); *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181 (11th Cir. 1984.)

Standard v. Swint, 456 U.S. at 288. But the mere fact that several circuit court panels have used less than precise language in explaining the mix of fact and law is hardly reason to grant certiorari.[11]

Finally, even if the Court of Appeals was granted plenary review in this case, the result would be the same. As outlined above, Petitioners must establish that they actually applied for an available vacancy. Petitioners concede that they did not apply for a vacancy during the actionable period, asserting that it would have been fultile to do so. Granting the Court of Appeals plenary review surely would not alter that Court's view that "the evidence is overwhelming that an application for transfer would not have been futile. . . ." (App. 13a.) Under any standard of review, a plaintiff who fails to establish that they applied for a vacancy (or that it would have been futile to do so) has failed to establish a *prima facie* case.

II. THE COURT OF APPEALS CORRECTLY UPHELD THE FINDINGS OF THE DISTRICT COURT AND DID NOT CREATE ITS OWN FACTUAL FINDINGS

Petitioners contend that this Court should grant certiorari because the District Court failed to make findings on their claims (1) that it would have been futile to apply for a transfer outside of the Bag Department and (2) that they were denied promotions within the Bag Department. (P. Br. pp. 16-17.) Petitioners contend that the Court of Appeals instead improperly filled in these factual findings.

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[11] A close examination of these cases reveals that they all apply essentially the same standard; "clearly erroneous" to the factual findings and *de novo* review to the issues of law. This is the same standard set out by Petitioners in their brief to the Court of Appeals.

A. Petitioners Have Waived Their Right To Object to a Lack of Adequate Findings By the District Court

Petitioners' argument in Section II of its petition is not that the District Court's findings were incorrect but that they were inadequate; that they did not reach all the issues. Yet, as with their first issue, Petitioners did not raise this contention until they petitioned for *en banc* review to the full Eleventh Circuit. A party may not seek appeal—and may certainly not obtain certiorari—based on a lack of findings by the district court when that party never requested that court to supplement or amend its findings. *See, e.g., Evans v. Suntreat Growers & Shippers, Inc.*, 531 F. 2d 568, 570 (Temp. Emer. Ct. App. 1976) (per curiam); *McMahon v. Caribbean Mills, Inc.*, 332 F. 2d 641, 643 (10th Cir. 1964).

Petitioners' claim in Part II of its petition is the same argument raised by virtually ever unsuccessful litigant in a bench trial where the court announces its findings from the bench. Every such litigant will be able to find certain issues or claims where the court's findings are less particularized than they otherwise might be if all parties had submitted prepared findings of fact and conclusions of law at the close of trial—a procedure which is quite awkward if not inappropriate where the court dismisses the action at the close of plaintiffs' evidence pursuant to a Rule 41(b) motion. Here, where Petitioners neither requested the District Court to amend or supplement its findings *nor* argued to the Court of Appeals that the District Court's findings were in some way inadequate, certiorari is wholly inappropriate.

B. The Court of Appeals Did Not Create Its Own Findings

The idea that the District Court did not make any findings as to the "petitioners' justifiable belief about the supposed futility of applying for transfers" is quite amazing. The District Court specifically found:

> Now, the plaintiffs would argue that it was futile to apply for a position because of the pattern and practice of the defendants in continuing to confine positions in the traditionally male lines of progression to men and the traditionally female lines of progression to females. With one exception, the evidence of this is to the contrary and in the Court's opinion does not rise to the level of a prima facie case, and that exception is the testimony of Mr. [Gordon] . . . but the evidence which is before the Court, first of all, is the collective bargaining agreement of '74 to '77; . . . that the collective bargaining agreements which were arrived at after the ordinary and regular course of labor negotiations were facially neutral; that at least in early 1976, prior to the effect of the operable period here, other lady workers were successful in transferring jobs into lines of progression which were normally filled by men, and the—at least one witness testified as having received what is in evidence as the Hudson Today article in 1974—in which the company advertised in 1974 for ladies to apply for what were traditionally men's jobs.
>
> Now, considering all of this evidence and all of the evidence which the Court has not discussed here, the Court finds that the plaintiffs have failed to establish a legally mandatory rebuttable presumption, giving rise to a prima facie case, and therefore the motions should be granted.

(App. 42a-43a.)

The Court of Appeals, reviewing the evidence to determine if the District Court's finding was clearly erroneous, held:

> [T]he evidence presented in this case fully authorized *the district judge to find* that no such futility existed here. Indeed, the *evidence is overwhelming* that an application for transfer would not have been futile; such applications for transfer were actively solicited by the appellees and, when received, were granted.

(App. 13a, emphasis added.)

Petitioners apparently contend that because they themselves testified that they personally believed it would have been futile to apply for a transfer, they have proved a *prima facie* case in spite of the evidence. (P. Br. pp. 16-17.) *McDonnell Douglas* and *Burdine* make clear that a plaintiff must establish a *prima facie* case by a *preponderance* of the evidence. 411 U.S. at 252-253. As the above-quoted portion of the District Judge's opinion establishes, the court considered "all of this evidence and all of the evidence which the Court has not discussed here," in concluding that it would not have been futile to apply for transfers. The fact that the District Court Judge did not state specifically in his findings that he did not find the statements of the plaintiffs to be credible is irrelevant.

Plaintiffs' claim with regard to being denied intradepartmental promotion to the baler position was an afterthought which received virtually no attention at trial.[12] The failure to receive automatic promotions within the Bag Department was not a claim raised in petitioners' EEOC charges. (*See* p. 2, *supra.*) Moreover, no witness testified at trial regarding vacancies in the baler position during the actionable period. Likewise, Petitioners' counsel made no mention of any baler vacancies during the actionable period in his closing arguments against Respondents' Rule 41(b) motion. *See* Tr. IV.[13]

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[12] Plaintiffs' lack of serious interest in the baler job was demonstrated by the fact they had not even noticed by September 30, 1976, when they filed their EEOC charges, that the labor agreement had been modified in 1974 to give them the right to bypass the heavy chute loader job and go directly to baler. (*See* pp. 3-4, *supra.*)

[13] Petitioners introduced into evidence certain seniority lists which they argued to the Court of Appeals purported to show vacancies in the baler position. No person testified to this effect at trial. The first time Petitioners raised this issue in earnest was before the Court of Appeals. It is therefore no wonder that Petitioners now contend that it was the Court of Appeals which ruled on this issue in the first instance.

It is perhaps for this reason that the District Court's findings on this issue were not as detailed as some others. That is not to say, however, that the Court made no findings on this issue. Evidence was presented that regardless of whether petitioners had to apply for a new position within their own department, there were no vacancies within that department during the actionable period. The District Court determined:

> The Court finds that no plaintiff requested a transfer, either intra- or interdepartment, and that the plaintiffs failed to prove that they had so requested such a transfer, that there was a vacancy between April 3 and September 30 of 1976 . . . .[14]

(App. 41a. *See also* finding set out at p. 10, *supra.*)

The Court of Appeals found that the District Court did in fact make an actual finding on the vacancy question. The Court determined that "taking the evidence regarding this issue on the whole, *the district court's finding* on this issue was not clearly erroneous." (App. 11a, emphasis added.) Reviewing this finding the Court of Appeals found that "*substantial evidence* exists that within the department no vacancy occurred for which any appellants were the most qualified." (App. 11a, emphasis added.) The question of vacancies in the baler position during the actionable period was simply a disputed question which the District Court actually ruled upon—against Petitioners.

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[14] Even though Petitioners offered no testimony relating to vacancies in the baler position, the District Court still made a finding on this question because it is part of the *McDonnell Douglas* analysis applied by the Court.

CONCLUSION

For the reasons stated above, and because the District Court dismissed Petitioners' action on the alternative grounds that Petitioners failed to satisfy EEOC administrative requirements, the petition for certiorari should be denied.

Respectfully submitted,

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Date: October 22, 1987